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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
SITTING AT AUSTIN, TEXAS

MICHAEL JOSEPH TILGHMAN, Appellant
v. THE STATE OF TEXAS, Appellee

On State's Petition for Discretionary Review

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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Identity of Judge, Parties, and Counsel

Parties to the trial court's judgment:	Michael Joseph Tilghman, Appellant/Respondent The State of Texas, Appellee/Petitioner
Presiding Trial Court Judge:	Honorable Gary L. Steel Hays County Government Center, 3rd Floor 712 South Stagecoach Trail San Marcos, Texas 78666
Appellant:	Michael Joseph Tilghman TDCJ # 02169940
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Appellee:	State of Texas
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Statement of the Case

Along with two co-defendants, Tilghman was charged by indictment with one count of Possession of a Controlled Substance—namely, Methamphetamine—with Intent to Deliver, in an amount greater than 4 grams but less than 200 grams. RR3 11-13; CR1 4; *see* Tex. Health & Safety Code § 481.112(d). At a pretrial hearing, Tilghman and one of his co-defendants, Travis Ward, sought to suppress evidence relating to the warrantless entry, seizure, and search of their hotel room on Fourth Amendment grounds. *See* RR2 6-54; RR3 5-9; CR1 5-6. The trial court denied Tilghman's motion. RR3 5-9; CR1 7-8, 34; Suppl.CR1 3-5, 8.

Subsequently, Tilghman entered into a plea bargain agreement with the State. Tilghman entered a plea of guilty in exchange for a sentence of ten (10) years imprisonment.[1] The trial court sentenced him accordingly and certified his right to appeal matters raised at the suppression hearing. RR3 6, 9-16; RR4 SX # 1; CR1 15-28, 34.

On appeal, a panel majority of the Third Court of Appeals agreed that Tilghman's Fourth Amendment rights were violated when "the hotel manager led police officers to a hotel room still occupied by Tilghman, unlocked the door for the officers, and stepped back as the officers, without a warrant, opened the door themselves and proceeded to enter the room." *Tilghman v. State*, 576 S.W.3d 449, 462 (Tex.App—Austin 2019). The panel majority also held "that the entry was not justified by exigent circumstances or any other exception to the warrant requirement." *Tilghman*, 576 S.W.3d at 469. The State did not file a Motion for Rehearing or a Motion for Reconsideration before the Third Court. The State did file a Petition for Discretionary Review. *See* Texas Rules of Appellate Procedure §§ 49.1, 49.7, 68.1, 68.2. The State filed a brief before this Court on October 3, 2019. The present Reply Brief is deemed timely submitted if filed on or before November 4, 2019. *See* Texas Rules of Appellate Procedure §§ 4.1(a), 70.1, 70.2.

[1] Ten years, not "two years." *Cf.* State's Brief at 1.

Issue Presented

The sole ground presented for review has been cast by the State in the following manner: "Did the Third Court of Appeals err in holding that a hotel manager who is accompanied by law enforcement may not open and enter a hotel room to effectuate a hotel guest's eviction due to ongoing criminal activity when multiple attempts to contact the room's occupants, including knocking on the door, failed?" State's Brief at 7.

Statement Regarding Oral Argument

The Court did not grant oral argument in this case. The Third Court entertained oral argument between the parties on April 24, 2019.[2]

Statement of Facts

Two witnesses testified at the pretrial suppression hearing, the hotel manager who unlocked the door of the hotel room, and the officer who then proceeded to open the door without the benefit of a warrant. RR2 11-44. Joshua Chapman arrived to begin his shift at the hotel at 10:52 PM, whereupon he received "a phone call from one of the previous managers—I don't recall which one—that had asked [him] to remove the occupants from the hotel for having drugs in the room." The basis for this belief was "[t]he smell of marijuana coming from the room."

[2] A recording of the proceedings is available for review on the Third Court's website (*see* http://www.txcourts.gov/3rdcoa/oral-arguments/).

Chapman himself walked down the hallway and confirmed that the odor of marijuana was emanating from the room. RR2 32-34.

Chapman had been informed that prior to his shift, other hotel employees had "tried to knock" on the door "[t]o get them to leave," "and that nobody answered." Chapman himself did not try to speak or make contact with the occupants at this point, nor did he knock on the door. Instead, Chapman decided to call for law enforcement assistance, for the sole purpose of having the occupants evicted. Chapman testified he did this due to concern for his own safety, "because I knew there was multiple guys in the room" and "[b]ecause of the nature of the drugs and it's just better [to call law enforcement] when it's just me." When asked, Chapman specifically denied that he had called for police assistance based upon the consideration that the prior effort at eviction by other employees had not succeeded. RR2 35-37, 42-43.

Chapman testified that other employees had previously knocked on the door and no one had answered, but he did not testify whether or not there were signs that anyone was present in the room at that time. He did mention that when one (or more) of the prior employees had knocked, "another gentleman said that they [*i.e.*, the occupants] were gone." RR2 35, 42-43. To Chapman's knowledge, the other employees had not attempted to slide a written notice of intent to evict underneath the door to the room. RR2 43.

The hotel had a nonsmoking policy in place, with no smoking signs posted. There was a notice contained in a "little binder" in the room, indicating that "there would be a fee" for violating the smoking policy, but nothing to suggest smoking was a basis for immediate eviction without further notice. While the hotel likewise had a policy to evict guests for criminal activity, this policy was not described in any rental agreement with the occupants. There was, in fact, no written rental agreement in place between the hotel and the occupants. The occupants paid a portion of the balance upon registering, and the balance was due upon checkout. The exact checkout time at this hotel is not contained in the record, but it was established to fall on "Saturday morning," i.e., the following day. RR2 9-10, 24, 36-40, 42; RR4 SX # MS-2.[3]

Four San Marcos Police Department officers—including Daniel Duckworth—responded to Chapman's call for assistance. Duckworth and his cohort arrived at the hotel, met with hotel employees including Chapman, and briefly waited for two more officers to arrive before proceeding to the room. This entire sequence of events is captured by Duckworth's bodycam footage, which is

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[3] SX # MS-2 is apparently a receipt, in co-defendant Travis Ward's name, reflecting that he registered for a two night stay beginning October 13.

Chapman also raised the issue that at the time he asked officers to evict the occupants, there remained a $50.00 balance on the room. However, his testimony also indicated that this partial balance was not due until checkout time the next day, "[a]nd the person checking them in decided that was okay." *See* RR2 17, 26-27, 38-40, 42; RR 4 SX # MS-1 at 04:25 to 04:45. *See Tilghman*, 576 S.W.3d at 454-55 fn. 1.

part of the record in evidence. RR2 9-10, 13-31, 40-44; RR4 SX # MS-1. After Duckworth and his colleague initially exchange greetings and pleasantries with the hotel staff, Chapman abruptly blurts out, "You can smell it halfway down the hallway." Duckworth's cohort replies, "You can smell it coming out the doorway?" An unidentified hotel clerk then explains, "It happened earlier today and like, we got near the door and there's a bunch of noises, and then, like, they heard us and they like, immediately, like the smell stopped, the voices stopped. And then, um, I saw them leaving the room like about twenty minutes ago, thirthy minutes ago, and then as soon as they left, I walked over again and the entire hallway reeked again." RR4 SX # MS-1 at 00:47 to 01:31. Otherwise, before the time that officers enter the room, no information is relayed to the officers on scene regarding prior attempts to contact the occupants or even so much as attempts to knock on their door. RR4 SX # MS-1 at 00:47 to 06:49.

When the officers arrive at the door with Chapman in tow, one officer knocks on the door twice without announcing himself, with no response. RR4 SX # MS-1 at 05:34ff, 06:06ff. The third time, the officer knocks and announces, "San Marcos Police, come open the door," again with no response from the occupants. RR4 SX # MS-1 at 06:20ff. Duckworth then agrees with the others that he can hear whispering inside, and gesturing to Chapman with his left hand, he states, "We don't have the authority to open the door, but you do." RR4 SX # MS-1 at 06:33ff.

Chapman produces a keycard from his back right pocket, and Duckworth gestures towards the door with his left hand with an encouraging, "It's all you." Chapman steps forward and unlocks the door. Duckworth and a cohort then open the door with their hands, and encountering two of the occupants at the entrance, Duckworth announces, "Here's the deal. Y'all, it's time for y'all to leave. You are no longer welcome guests at this hotel." RR4 SX # MS-1 at 06:33 to 07:07.

Summary of the Argument

Under the limited circumstances presented by the instant case, the panel majority correctly determined that Tilghman's Fourth Amendment rights were violated when officers opened the door to his hotel room without a warrant. The opening of the door—followed by the officers' immediate entry into the room—itself constituted a search and seizure prohibited by the Fourth Amendment, whether or not this action was taken in an effort to assist the hotel in evicting the occupants, and whether or not the eviction was "police-initiated" or "hotel-initiated." Because the panel majority correctly decided that the trial court abused its discretion by denying Tilghman's motion to suppress, this Court should affirm the panel majority's decision.

Argument

The State asserts that the panel majority "misapplies" the Supreme Court decision in *Stoner v. California*, 376 U.S. 483 (1964). State's Brief at 3-7, 10, 15-

16. *Stoner* stands for the simple proposition that a hotel room guest is protected by the Fourth Amendment against unreasonable searches and seizures, and that the general requirement of a search warrant is not suspended merely because of the guest status of the occupants of the room. *Stoner*, 376 U.S. at 490; *Moberg v. State*, 810 S.W.2d 190, 194 (Tex.Crim.App. 1990). Ten years prior to *Stoner*, this Court determined the same protections were afforded to hotel guests by the Texas Constitution, Article I, Section 9. *Tarwater v. State*, 150 Tex.Crim. 59, 267 S.W.2d 410, 411-412 (1954); *Moberg*, 810 S.W.2d at 194.

These protections expire the moment the term of occupancy comes to an end. Thus, in the context of Fourth Amendment protections and how they apply to a hotel room, whether or not the term of occupancy has expired is never "constitutionally insignificant." *Cf.* State's Brief at 4. In this regard, both the State and the dissenting opinion by Justice Kelly afford *Voelkel* far too much breadth. In *Voelkel*, the defendant had overstayed her term of occupancy by two hours, after hotel staff had repeatedly informed her in person that she needed to fully vacate by checkout time. The court simply ruled that under those circumstances, Voelkel already "had a substantially diminished expectation of privacy" in her room by the time the staff invited officers to enter the room to evict her, such that there was no Fourth Amendment violation. *Voelkel v. State*, 717 S.W.2d 314, 315-16 (Tex.Crim.App. 1986). *Voelkel* does not stand for the blanket proposition that "it is

permissible for a police officer to help effectuate that eviction when requested by hotel staff." *See* State's Brief at 7-8, 10; *Tilghman*, 576 S.W.3d at 470 (Kelly, J., dissent), *citing Voelkel*, 717 S.W.2d at 315-16.[4]

The panel majority was correct in determining that *Voelkel*—and likewise *Brimage v. State*, another case where the term of occupancy had expired—did not apply to the instant cause, where the term of occupancy had not yet expired and the occupants had not in fact been evicted prior to the officers' entry into the room. *Tilghman*, 576 S.W.3d at 460-61; *see Brimage v. State*, 918 S.W.2d 466, 496, 507 (Tex.Crim.App. 1996) (op. on reh'g), *quoting United States v. Parizo*, 514 F.2d 52, 54 (3rd Cir. 1975): "When the terms of a guest's occupancy of a room expires, the guest loses his exclusive right to privacy in the room. The manager of a motel then has the right to enter the room and may consent to a search of the room and the seizure of the items there found." The panel majority's opinion does not conflict with either *Voelkel* or *Brimage*. They simply do not apply, as the panel majority duly noted. *See* State's Brief at 3, 7-8, 10; *Tilghman*, 576 S.W.3d at 461.

The State insists "the [panel] majority overlooks that when the police entered Appell[ant]'s hotel room, no search or seizure was taking place." The State

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[4] Even where the hotel guest had been repeatedly warned to vacate by 1:00 PM and still showed no signs of leaving by 3:00 PM, the decision in *Voelkel* was reached by a 5-4 split majority. Presiding Judge Onion dissented without written opinion. Judge Clinton and Judge Teague each wrote vigorous dissenting opinions in support of a finding of Fourth Amendment violations. Judge Miller joined both dissenting opinions. *Voelkel*, 717 S.W.2d at 317-25. (Onion, P.J., dissent) (Clinton, J., dissent, joined by Miller, J.) (Teague, J., dissent, joined by Miller, J.).

reasons that because the officers' sole purpose in entering the room was to evict the occupants, there was no search or seizure. State's Brief at 6-7, *citing Tilghman*, 576 S.W.3d at 461 fn. 5. It is the State, however, that overlooks that the very opening of the door itself constituted a search. "A Fourth Amendment claim may be based on a trespass theory of search (one's own personal effects have been trespassed), or a privacy theory of search (one's own expectation of privacy was breached). If the government obtains information by physically intruding on persons, houses, papers, or effects, a trespass search has occurred. If the government obtains information by violating a person's reasonable expectation of privacy, regardless of the presence or absence of a physical intrusion into any given enclosure, a privacy search has occurred." *State v. Rodriguez*, 521 S.W.3d 1, 9 (Tex.Crim.App. 2017) (citations omitted); *see also Kyllo v. United States*, 533 U.S. 27, 40 (2001).

As the Supreme Court held in *Kyllo*, "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman,* for example, we made clear that any physical invasion of the structure of the home, 'by even a fraction of an inch,' was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details,

because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37 (emphasis in original), *quoting Silverman v. United States*, 365 U.S. 505, 512 (1961). "[T]he Fourth Amendment draws 'a firm line at the entrance of the house.'" *Kyllo*, 533 U.S. at 40, *quoting Payton v. New York*, 445 U.S. 573, 590 (1980).

The State correctly notes that the Texas Legislature has not passed any statutory guidance "regulat[ing] when and how hoteliers may evict their tenants." State's Brief at 9. Additionally, it is true that "[t]he hotel eviction case law holding that a hotelier does not have to satisfy any legal requirements before eviction has been in existence for 73 years." State's Brief at 9-10, 10 fn. 6, *referring to McBride v. Hosey*, 197 S.W.2d 372, 375 (Tex.Civ.App.—El Paso, 1946, writ ref'd n.r.e.), *cited by Bertuca v. Martinez*, No. 04-04-00926-CV, 2006 WL 397904, at *2 (Tex.App—San Antonio February 22, 2006, no pet.) (not designated for publication); *see also Tilghman*, 576 S.W.3d at 471 (Kelly, J., dissent). But the State fails to also mention that even in the non-criminal context of *McBride*, where a disgruntled evictee sought civil damages from a hotel, the court implied that eviction from a hotel nevertheless required some degree of notice to the occupant: "It is consistently held that when the right to evict, *e.g.* when a guest is obnoxious for some reason he may be forcibly removed and without resort to legal process, provided no more force is used that is necessary. Plaintiff can hardly be heard to

say *he did not have reasonable notice*, because he alleges and testifies he was harshly treated from November 1944 forward. He must have regarded the *written notice* of February 1st to vacate as seriously made. The purpose of the *notice* was to allow time in which to secure other accommodations." *McBride*, 197 S.W.2d at 375 (internal citation omitted) (emphasis supplied). *Cf.* State's Brief at 9-10, 10 fn. 6, 13-14.

Other states, such as Missouri and Georgia, have enacted statutes that "authoriz[e] the removal of guests under certain circumstances," such as "evictions based on a reasonable belief of illicit activity." The applicable Missouri statute[5] provided the justification for the police entry in *Peoples*, which the State heavily relies upon throughout its brief. *United States v. Peoples*, 854 F.3d 993, 996-97 (8th Cir. 2017), *citing United States v. Rambo*, 789 F.2d 1289, 1294 (8th Cir. 1986); State's Brief at 3, 10-15; *see also Tilghman*, 576 S.W.3d at 470-71 (Kelly, J., dissent). Clearly, such statutes put hotel guests on notice that certain activities may subject them to immediate eviction, under the theory that *ignorantia legis non excusat*.[6] No such provision exists in Texas. The utility of *Peoples* for the instant

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[5] "An owner or operator of a hotel may eject a person from the hotel and notify the appropriate local law enforcement authorities [if] . . . [he or she] reasonably believes that the individual is using the premises for an unlawful purpose." *Peoples*, 854 F.3d at 995-96, *citing* Mo. Rev. Stat. § 315.075(3).

[6] But see *Stoner*, 376 U.S. at 488 (emphasis supplied): "Even if it be assumed that a state law which gave a hotel proprietor blanket authority to authorize the police to search the rooms of the

analysis is further diminished by the fact that Peoples did not frame his challenge to the police eviction on straightforward Fourth Amendment grounds as Tilghman did in the lower court, nor did Peoples challenge the constitutional basis of the statute itself.[7] *See* State's Brief at 3, 11-13, 15.

The State avers that the instant cause "presents a fact pattern that is almost identical to" *Johnson v. State*, 285 Ga. 571, 679 S.E.2d 340 (Ga. 2009). State's Brief at 12. In *Johnson*, the hotel clerk similarly sought police assistance to evict a guest. After the clerk tried to contact the occupant according to hotel protocol without success, she "unlocked the door, but asked the officers to open the door because she was frightened." The court affirmed the subsequent search of the room, in part. *Johnson*, 679 S.E.2d at 341-43. The State fails to note, however, that by Georgia statute, "the hotel manager had the authority to terminate Johnson's rental agreement without prior notice." "See OCGA § 43-21-3.1(b), which provides that a hotel need not provide notice of a 'termination of occupancy for cause, such as failure to pay sums due, failure to abide by rules of occupancy, failure to have or maintain reservations, or other action by a guest.'" *Johnson*, 679

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hotel's guests *could survive constitutional challenge*, there is no intimation in the California cases cited by the respondent that California has any such law."

[7] Peoples instead complained (1) that the police circumvented the Fourth Amendment by acting through a private citizen (*i.e.*, a hotel employee) to effect a search, and (2) that the statute only authorized hotel staff to alert the police to illicit activity, not vice versa. These claims were rejected based on the facts presented to the court. *Peoples*, 854 F.3d at 996-97.

S.E.2d at 342, 342 fn. 11. Again, Texas has no similar statutory provision. *See* State's Brief at 3-4, 11-12.

Some establishments take preemptive measures in advance to put their guests on notice that certain activities will result in immediate eviction, and that eviction may then occur without any further notice. In *Tolbert*, the guest who rented the room signed "a document detailing the hotel's 'no party policy,'" which "admonishe[d] that any violation 'will result in immediate eviction.'" *See United States v. Tolbert*, 613 Fed.Appx. 548, 549 (7th Cir. 2015) (not designated for publication). "Evidence at the hearing established that the hotel had rented Room 912 subject to the condition that guests who violate its no-party policy are subject to immediate eviction." *Tolbert*, 613 Fed.Appx. at 551; *see also Commonwealth v. Molina*, 459 Mass. 819, 948 N.E.2d 402, 409-10 (2011). There was no such policy or agreement in place in the instant cause, and despite any other superficial similarities, *Tolbert* and *Molina* are similarly not relevant to the instant analysis. *See* State's Brief at 3, 10-15; *see also Tilghman*, 576 S.W.3d at 471 (Kelly, J., dissent).

It is unclear why the State mentions *Bass* in the same breath as *Peoples* and *Tolbert*. State's Brief at 3, 11, *citing United States v. Bass*, 41 Fed.Appx. 735 (6th Cir. 2002) (not designated for publication). In *Bass*, the defendant was arrested outside of his hotel room prior to the expiration of his occupancy, and the court

upheld the suppression of evidence found in the room. After the arrest, the hotel manager "asked the police officers to make sure that the hotel room was safe and secure." He also "testified that he personally considered Bass evicted once he had been arrested." The court found that "the manager's personal beliefs have no legal import," *citing Stoner*, 376 U.S. at 490, and in the absence of evidence showing that Bass had in fact already been evicted, "the police officers could not reasonably rely on the hotel manager's consent in entering Bass's hotel room," *citing Stoner*, 376 U.S. at 488. *Bass*, 41 Fed.Appx. at 736-38. "The Court notes that the hotel-guest contract did not authorize the hotel to evict a tenant upon his or her arrest." *Bass*, 41 Fed.Appx. at 738 fn. 6; *cf. Moberg*, 810 S.W.2d at 197.

The State also cites an array of other Federal and State cases not yet discussed above involving "a similar situation where a hotel room's occupancy term had not naturally expired." State's Brief at 11-15. For various factual reasons, these cases likewise fail to apply with any substantive force to Tilghman's particular circumstances. In *Banks*, officers were sent to the defendant's room to evict him at the hotel's request. The defendant did not respond to initial knocks, but he eventually opened the door voluntarily. The officers explained to him that he had been asked to leave, but the defendant refused to listen and likewise refused to step out of the room, whereupon he was handcuffed and led away. *United States v. Banks*, 262 Fed.Appx. 900, 902-05 (10th Cir. 2008) (not designated for

publication). No such fact pattern exists in the instant cause. Further, *Banks* did not raise a Fourth Amendment challenge in the trial court, nor did he challenge the legitimacy of his eviction on appeal. *Banks*, 262 Fed.Appx. at 903-04, 904 fn. 1. *See* State's Brief at 11-12.

In *Williams*, the defendant had been arrested outside of his room for "an unrelated criminal offense Williams allegedly committed against a hotel employee." *State v. Williams*, 2016 ND 132, 881 N.W.2d 618, 620-21 (2016). "The hotel manager testified that Williams gave her a look as he was removed from the hotel that made her very uncomfortable," whereupon she notified the officers that she wanted him evicted from the hotel. After the hotel manager verified at the officers' request that hotel policy authorized eviction under the circumstances, the officers obliged. Further, "Williams [did] not argue that the manager did not have authority to evict him or that the eviction was not appropriate under hotel policy." *Williams*, 881 N.W.2d at 623-24.[8] *See* State's Brief at 11-13.

Bordley involves a complicated and uncommon set of facts where the hotel clerk had already locked out the room in question over legitimate safety concerns. These concerns were based on observations that led her to believe that unknown

[8] While it has no bearing on the analysis of the instant cause, the decision in *Williams* is contrary to this Court's holding that a hotel guest's arrest does not automatically trigger immediate eviction. *Moberg*, 810 S.W.2d at 196-97.

individuals had gained unauthorized access to the room, perhaps with intent to rob the hotel. When police responded, they encountered Bordley outside of the room, who averred that he was no longer occupying the room and disavowed knowledge of its contents. Only then did the police enter the room. Under these particular circumstances, the court reasoned that Bordley no longer had an objectively reasonable expectation of privacy in the room. *Bordley v. State*, 205 Md.App. 692, 46 A.3d 1204, 1209-18 (2012). *See* State's Brief at 12.

In *Haddad*, the defendant had been observed in possession of a handgun in the common areas of the hotel. Officers had advised Haddad "not to carry a gun on the hotel premises." After Haddad again admitted to hotel staff that he was carrying a firearm, officers confronted Haddad, at which point he became unruly and was arrested for disorderly conduct. Haddad then decided to check out of the hotel and was given a criminal trespass warning, at which point he told officers "he did not want any belongings he might have left in the room." Under these particular circumstances, Haddad was found to have no reasonable expectation of privacy in the room and no standing to challenge its subsequent search. *United States v. Haddad*, 558 F.2d 968, 971, 974-76, 975 fn. 6 (9th Cir. 1977). Likewise, in *People v. Hardy*, 77 A.D.3d 133, 138-41, 907 N.Y.S.2d 244 (N.Y. 2010), the defendant was found to have no standing to contest the search of his room. When officers accompanied the hotel manager to evict Hardy sometime after 5:15 AM,

he was in arrears for the room rental, where payment had been owed in full at checkout time of 11:00 AM the day before. *Hardy*, 77 A.D.3d at 135-39. In this sense, *Hardy* is much more similar to *Voelkel* or *Brimage* than it is to the instant cause. *See* State's Brief at 12-13.

Turning back to the facts of the instant cause, the State begins its argument in chief by asserting that the "police officers were summoned by a hotel manager to assist in evicting several hotel guests *who had ignored previous attempts by the hotel staff to contact them* in response to the marijuana smell emanating from their room." State's Brief at 5 (emphasis supplied). Elsewhere, the State claims, "the hotel manager entered[9] *only after Appell[ant] and his guests refused to respond to attempts to contact them*," and "[a]ll hotel occupants would need to do to thwart eviction is ignore hotel staff eviction notice attempts, *as Appell[ant] and his co-defendants did here*." State's Brief at 8 (emphasis supplied). *See also* State's Brief at 14.

As noted by the State, the hotel manager did testify that there had been prior attempts by one or more employees to knock on the door. RR2 35; State's Brief at 2. However, Chapman did not testify that the occupants had proactively ignored or evaded these attempts, or even that there were signs that the occupants were

[9] The record actually shows that the hotel manager did not enter the room with the officers after he unlocked the door for them. *See* RR4 SX # MS-1 at 06:33 to 07:07ff.

present in the room at the time. Instead, the "other hotel employees" had simply informed Chapman "that they tried to knock and that nobody answered. And another gentleman said that they were gone." RR2 35; *see also* RR2 42-43. Officer Duckworth testified that the hotel manager on duty contacted law enforcement for assistance after "[h]e had tried [to evict the occupants] and they refused to come to the door." RR2 27. But this was contradicted by Chapman, who specifically testified that he never knocked on the door and did not otherwise try to personally make contact with the occupants, either before or after they were evicted. RR2 35, 42-43.

On cross-examination, Duckworth also testified, "It was my understanding that management had attempted to [inform the occupants that they needed to leave] and the residents of the room refused to answer their door so they were unable to." RR2 31. However, this testimony is unsupported by the bodycam evidence in the record. From the point at which Chapman greets Duckworth until the encounter at Appellant's door and the entry into his room, Chapman and his colleagues relay no such information to the officers regarding prior employees' attempts to contact the occupants, much less efforts by the occupants to evade those attempts at contact. RR4 SX # MS-1 at 00:01 to 07:07. During the exchange in the lobby, the unidentified hotel clerk merely states that at one point, employees could smell marijuana when they got close to the door, and they heard noises inside. He does

not state that employees tried to knock on the door or otherwise contact the occupants at that time. RR4 SX # MS-1 at 00:47 to 01:31.

The State suggests that "the suppression hearing record" demonstrates that Tilghman had been "evicted at the time officers made entry." State's Brief at 11. Nothing could be farther from the truth. Officer Duckworth's bodycam recording makes it quite clear that Tilghman was in fact not evicted until after the officers entered the room. *See* RR4 SX # MS-1. There is no evidence in the record that hotel staff had communicated to the occupants its intent to evict them from the room. Whereas the State claims that Tilghman and his peers had evaded the staff's efforts to speak with them, the only evidence in support of this comes from Duckworth's testimony that (1) the hotel manager contacted law enforcement for assistance after "[h]e had tried [to evict the occupants] and they refused to come to the door," and that (2) it was his "understanding that management had attempted to [inform the occupants that they needed to leave] and the residents of the room refused to answer their door so they were unable to." RR2 27, 31. To reiterate, Chapman specifically testified that he never knocked on the door and did not otherwise try to make any contact with the occupants. RR2 35, 42-43. Further, review of the bodycam footage shows that no such information was relayed to Duckworth from the time he entered the hotel lobby until the eviction and search were well underway. RR4 SX # MS-1 at 00:01 to 07:07ff.

There is no support in the record for the idea that Tilghman and his co-defendants were on any sort of notice that they had lost their reasonable expectation of privacy in the room at any time prior to the point when the officers had already entered the room and informed them that they were no longer welcome at the hotel. *See* RR4 SX # MS-1 at 06:33 to 07:07ff. There was no statutory provision in place in this State that might have provided constructive notice that certain actions could result in immediate eviction without further notice. There was no policy—expressed in a rental agreement or otherwise—that would have provided actual or constructive notice along the same lines. Much more importantly, however, the officers had no reason to believe that the occupants' reasonable expectation of privacy had been extinguished at the moment they decided to open the door to the room regardless. *See Moberg*, 810 S.W.2d at 197. The State failed to meet its burden to show that the warrantless entry was justified under the circumstances. The panel majority concluded "that the police, by opening the door to Tilghman's hotel room and entering the room without a warrant, while Tilghman still had a right to occupy the room, violated Tilghman's Fourth Amendment rights," and was further "not justified by exigent circumstances or any other exception to the warrant requirement." *Tilghman*, 576 S.W.3d at 469. For the reasons discussed above, this Court should apply the same logical analysis and affirm the panel majority's decision.

Conclusion

The panel majority correctly held that the trial court abused its discretion in overruling Tilghman's motion to suppress evidence derived from the search of the hotel room. As such, this Court should affirm the panel majority's decision to reverse the judgment of the trial court and remand for further proceedings.

Prayer for Relief

Mr. Tilghman respectfully requests this Court affirm the judgment of the Third Court of Appeals, which reversed the trial court's judgment of conviction and remanded for further proceedings. Mr. Tilghman additionally prays for any and all additional general relief to which he may be entitled.

Respectfully submitted,

__/s/ Paul M. Evans_____

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing Appellant's Reply Brief was delivered by e-service to the office of the Criminal District Attorney of Hays County, both to Criminal District Attorney Wesley H. Mau and Assistant Criminal District Attorney Michael C. McCarthy—mailing address 712 S. Stagecoach Trail, San Marcos, Texas 78666, physical address 509 W. 11th Street, Austin, Texas 78701—on this the 3rd day of November, 2019. I additionally certify that on this day service was made via the State e-filing service on Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

___/s/ Paul M. Evans_____

Paul M. Evans

Certificate of Compliance

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document does comply with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 4,988 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

___/s/ Paul M. Evans_____

Paul M. Evans